No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *ET AL.*,

Petitioners,

v.

ROBERT SIMON, *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR TORTURED AMERICAN PRISONERS OF WAR AS AMICI CURIAE SUPPORTING AFFIRMANCE

JOHN NORTON MOORE
Counsel for Amici Curiae
824 Flordon Drive
Charlottesville, Virginia 22901
(703) 216-5387 (T)
(434) 977-2749 (F)

[illegible]

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a subsidiary clause of section 1503 of the EWSAA, which does not mention courts, jurisdiction or immunity, and which was drafted by the President and presented to the Congress with the written explanation that it would authorize the President to "make inapplicable" specified provisions of the Foreign Assistance Act, can instead be used by the President to strip the statutory jurisdiction of an Article III court?

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INTEREST OF TORTURED AMERICAN PRISONERS OF WAR

On April 4, 2002, seventeen American servicemen held as prisoners of war ("POWs") and tortured by Iraq during the 1991 Gulf War, and thirty-seven of their family members, filed suit in federal district court to hold their torturers accountable and to deter future torture of American POWs.[1] The Department of State served process on Iraq and the principal witness for the American POWs was the top law of war expert in the Army JAG Corps. As required by the Foreign Sovereign Immunities Act ("FSIA"), the case was brought only after Iraq refused to accept international arbitration. Liability of Iraq was then determined after a full review of the law and the facts by a federal judge, precisely as the law provides for claims brought against the United States under the Federal Tort Claims Act.

The American POWs who brought this case were tortured through brutal beatings, starvation, electric shock, whipping, burning, mock executions, threatened dismemberment, threats to their families, breaking of bones and eardrums, and horrifying genital inspections aimed at discrimination against Jews. For spouses and other family members, Iraq's refusal to permit notification of capture, its public statements about

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

POWs as human shields, and its coerced propaganda tapes of beaten POWs produced severe mental anguish. The plaintiff for whom their case takes its name, Marine Colonel (Ret.) Cliff Acree, endured one painful operation after another on his return because of his courageous refusal to criticize President George H.W. Bush to his Iraqi captors. The horrifying specifics for each of the POWs and family members are detailed in *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003).

In *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), the Court of Appeals ruled that the President lacked authority to strip the courts of jurisdiction, but overturned their judgment as lacking a cause of action, an issue not raised by the parties. While the *Acree* POWs sought *certiorari* to this Court, the Executive urged that the Court not grant *certiorari*, asserting as a reason the only argument it has ever made in court against the POWs and which is now presented to this Court—that the President was delegated authority by section 1503 of the EWSAA retroactively to remove the jurisdiction of the court which awarded their judgment. This Court declined *certiorari* in *Acree* (544 U.S. 1010 (2005)), thus declining to review the *sua sponte* dismissal of the POWs' case, based on a post-judgment decision in another case by the D.C. Circuit, and without remanding the case back to the District Court to review alternative causes of action pled by the POWs. After opposing *certiorari* in *Acree* where the section 1503 issue was presented, along with the unjust *sua sponte* dismissal by the Court of Appeals, the Government then supported *certiorari* in *Beaty*. Because the *Acree* case is still before the courts, the tortured American POWs

and family members will be directly affected by the decision of this Court and urge affirmance of the decisions below in *Beaty* and *Simon*.[2]

STATEMENT

The FSIA was enacted in 1976 to clarify United States practice concerning sovereign immunity. The law was principally jurisdictional, but it also made important substantive changes in scope of immunity, service of process, attachment, execution and other areas. Centrally, however, following severe criticism of State Department actions in deciding sovereign immunity on an *ex parte* basis, the FSIA was enacted to transfer determinations of immunity from the Executive to the courts. Henceforth decisions as to immunity would be made by the courts. There was no exception in the FSIA for the Executive to overrule judicial determinations. For over a quarter century a broad range of actions against foreign states have been permitted under the FSIA in United States courts. These actions are not "sanctions," but recognition that injured Americans deserve their day in court and a repudiation of politically motivated immunity decisions.

In 1996, Congress broadened the FSIA to include actions for torture and hostage taking committed against Americans, provided that the foreign state had been designated as a terrorist state at the time the act occurred. This broadening, specifically creating new statutory liability, was fought by the State

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[2] The *Acree amici* are listed at App. A.

Department which has continued to resist these terrorism actions despite Congress' will.[3]

The *Acree* case was brought under the FSIA. Counsel included Monroe Leigh, a former Legal Adviser to the Department of State, and John Norton Moore, a former Counselor on International Law to the Department who participated in drafting of the FSIA while serving as Counselor. Counsel quickly met with the Legal Advisers to both State and Defense and received no indication of opposition to the POWs' historic action to deter the torture of American POWs. Fifteen months later, however, after final judgment for the POWs and their family members, the Executive intervened seeking to erase their judgment. Subsequently, counsel learned through the media that certain legal officers within the Administration were authorizing controversial actions against detainees, creating a distorted dynamic.

On March 14, 2003, on the eve of the war with Iraq, twenty distinguished American national security officials wrote President Bush urging that it was in the United States' national security interest to add deterrence against torture of POWs and that the *Acree* case was "an historic opportunity that should not be lost." App. B. They thus urged the President to set aside an escrow from the blocked Iraqi assets to pay a judgment

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[3] For a history of this opposition, rooted in the State Department claims office, see J. N. Moore, *Civil Litigation Against Terrorism: Neglected Promise* (available from the Center for National Security Law, the University of Virginia 2009). *See also Civil Litigation Against Terrorism* (J.N. Moore ed., 2004).

for the POWs. This letter was signed by a former Chairman of the Joint Chiefs of Staff, a former Assistant to the President for National Security Affairs, two former Legal Advisers to the Department of State, and others. But while the Administration set aside over $100 million from the blocked assets to pay the judgments of civilians held as "human shields," nothing was set aside for the POWs.

The only *legal* argument the Executive has ever made against the POWs is that in section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA") for the Iraq War, Congress delegated to the President the power retroactively to remove the jurisdiction of the court which awarded the POWs' judgment. This argument, as presented again to this Court, is a classic bait and switch on the Congress. The subsidiary clause of section 1503, which does not mention courts, jurisdiction, or immunity, had been drafted by the Executive who specifically told the Congress in writing that the clause would "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Resp'ts' Opp'n Cert. 22a. The Executive then, belatedly, executed the switch and asserted in court that this clause permitted the Executive retroactively to remove the jurisdiction of the courts. This argument was rejected both by the District Court and the Court of Appeals in *Acree* and is now before this Court.

The only *policy* argument made by the Executive in its opposition to the POWs' judgment has been that the funds were needed for the "reconstruction of Iraq."

This argument rings hollow, however, as the Executive had already seized $1.7 billion in blocked Iraqi assets which had been earmarked by Congress to pay section 1605(a)(7) judgments, and it had issued an Executive Order blocking attachment of Iraqi assets. Nor will funds of Iraq be exposed to attachment or execution today by the decision of this Court. Moreover, the Executive worked with Iraq to settle approximately $19 billion in Saddam-era claims of foreign corporations against Iraq while simultaneously seeking to erase the POWs' judgment. Yet the POWs' claims against Iraq are the only claims guaranteed by treaty, binding on both the United States and Iraq. Article 131 of the Third Geneva Convention (the POW Convention) provides that no state may "absolve" a torturing state of "any liability" for the torture of POWs, a "grave breach" of the Convention.

Congress pushed back against the effort to erase the POWs' judgment. Thus, numerous members of Congress, on a bi-partisan basis, wrote the Administration urging support for the POWs' historic effort to hold their torturers accountable. Without dissent, the Senate adopted an amendment supporting the POWs. Subsequently, both houses of the Congress adopted section 1083(c) of the 2008 National Defense Authorization Act ("NDAA") which declared in a section entitled "PRESERVING THE JURISDICTION OF THE COURTS" that "Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code [the FSIA], or the removal of

the jurisdiction of any court of the United States." 122 Stat. at 343 (2008). This section further permitted the POWs to file a motion in United States District Court to restore their original judgment which had been set aside *sua sponte* by the Court of Appeals for the D.C. Circuit on the grounds that section 1605(a)(7) to the FSIA and the subsequent "Flatow Amendment" to that section had not created a federal statutory cause of action against a state. This Court of Appeals ruling was counter to the text and clear legislative history of that section and ignored counsel's repeated statements to the Court during oral argument that state law created an alternative basis for cause of action. The D.C. Circuit then dismissed the POWs' complaint despite the official view of the United States and this Court that state law is a basis for cause of action under the FSIA.[4] Nothing in section 1083(c) as put into the NDAA for the POWs would have permitted recovery against Iraqi assets. It would, however, have restored their judgment against Iraq, a matter which continues on appeal following the filing by the POWs of a 60(b) motion requesting a hearing on the cause of action issue. President Bush then exercised a hybrid veto against the NDAA until given a waiver authority against the entire section 1083 (the Lautenberg Amendment) with respect to Iraq. The Lautenberg Amendment, going beyond the 1083(c) provisions for the POWs, included provisions permitting execution against Iraqi bank assets.

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[4] *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. at 622 n.11 (1983); *Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees* in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, No. 03-7117, at 11, 13 (May 14, 2004).

Following months of Executive inaction toward resolution of the POWs' claims, in September 2008, the House of Representatives, on a bi-partisan basis and without dissenting vote, adopted the Justice for Victims of Torture and Terrorism Act (H.R. 5167, 110th Cong. (Sept. 15, 2008)). The Act would have comprehensively resolved claims in United States courts against Iraq, including the Respondents', the "human shield" and the POW torture cases; thus giving teeth to the unanimous resolutions of the House and Senate warning Iraq during the 1991 Gulf War that it would be held accountable for torture of American POWs.[5] But in recognition of the new Government of Iraq the Act would have waived all punitive damages awarded by the courts as well as approximately two-thirds of compensatory damages. As such, the Act would have resolved virtually all valid claims against Iraq in U.S. courts for approximately $400 million. This Act, supported by the POWs, was cleared for the Senate consent calendar, but was then stopped by an anonymous hold.

After seeking to erase the cases against it in American courts (by urging President Bush to waive U.S. law), in June 2008, Iraq then filed an action in the Southern District of New York against 93 corporations seeking approximately $2 billion in damages under U.S. treble damage laws.[6]

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[5] *See, e.g.*, S. Con. Res. 8, 102d Cong. (as passed by Senate, Jan. 31, 1991) (condemning Iraq's violations of the Third Geneva Convention).

[6] *Republic of Iraq v. ABB AG*, Civ. Act. No. 5951 (S.D.N.Y. compl. filed June 27, 2008).

While past Executive practice has settled claims of Americans through claims settlement agreements, here the Executive sought to set aside the jurisdiction of the courts with respect to valid claims against Iraq without a claims settlement agreement. As such, there was no compensation to the claimants or provision for an alternative claims tribunal as in the 1980's agreement with Iran. Yet simultaneously the Administration was assisting settlement of over $19 billion in Saddam-era debts owed to foreign corporations such as Mitsubishi of Japan and Hyundai of Korea.

The national security claims asserted by Petitioners are misplaced; indeed upside down. Iraq has been settling billions in Saddam-era claims with foreign nations and corporations. It is an insult to national honor, a violation of Iraq's obligations under the Third Geneva Convention, and a security concern for America that Iraq seeks to absolve the claims of tortured American prisoners of war. As military experts have stated in *Acree,* absolving Iraq of liability can inhibit military recruitment, harm morale of our armed forces, and increase the risk that American POWs will be tortured. This Court was deceived by asserted security considerations in wartime presentation in the infamous *Korematsu* case. It should not be deceived again.

Repeated entreaties to the Executive and to Iraq to settle this case, including a plea by Judge Richard W. Roberts, produced not a single effort to move forward—only enhanced efforts to erase the POWs' historic judgment. Should the POWs' congressionally-affirmed action in the courts be dismissed there will be little incentive for Iraq ever to resolve these claims, or for

Iraq and the United States to adhere to their Third Geneva Convention obligation never to "absolve" a torturing state of "any liability" for torture of POWs. Most importantly, should the State Department succeed in its effort to erase the POWs' historic judgment for torture, and to set aside the United States' obligation under the Geneva Convention, it will increase the risk of torture for American service personnel held as POWs by the enemy, as their captors conclude from this sad episode that America does not care whether its POWs are tortured.

SUMMARY OF ARGUMENT

1. The power of Congress to strip jurisdiction from an Article III court is a power fundamentally affecting the independence of the judiciary. Jurisdiction stripping should never be assumed absent clear congressional intent. Here, however, there is no indication in the text of section 1503 of EWSAA, the text of EWSAA as a whole, or the legislative history of EWSAA, that Congress sought to strip the courts of jurisdiction with respect to long-standing cases against Iraq. To the contrary, section 1503 was drafted by the Executive and given to the Congress for inclusion in EWSAA, and the Executive told Congress in writing that the purpose of the clause was to "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Resp'ts' Opp'n Cert. at 22a.

The text certainly has no plain or manifest meaning compelling an interpretation that it was intended to permit jurisdiction stripping. Indeed, the text is subject

to at least five preferable interpretations to that asserted by Petitioners, each of which would negate jurisdiction stripping.

The most reasonable of these purely textual interpretations is that found by the *Acree* Court of Appeals; that is, if the connecting "or" is not used in its primary sense as a disjunctive particle meaning "not both," then its second preferred meaning is as a conjunctive in which the textual interpretation of the second dependent clause takes its meaning from the first.

Further, the legislative history is conclusive that the purpose of section 1503 was to permit removal of limitations on assistance to Iraq, as embodied in the Foreign Assistance Act. Nor is the most important legislative history here simply a floor statement or committee report but rather history of greater significance. For it is history going to the core of congressional consideration; that is, the Executive as drafter of the provision told the Congress in writing when he presented the text to Congress that the purpose of the clause was to authorize the President to make inapplicable specifically designated provisions of the Foreign Assistance Act which would have limited funding for Iraq. Nowhere in the text or legislative record is there any mention of jurisdiction or immunity.

2. This case is *not* about the delegation principle. Rather, it presents a straightforward issue of statutory interpretation whether the Congress intended to include in any package of statutes the President was authorized to "make inapplicable" provisions of FSIA

removing jurisdiction from pending cases in United States courts. As such, arguments of Petitioners concerning deference to the President's foreign affairs power are misplaced. No such deference is due the President on the issue of what Congress intended—and particularly not when the issue is repeal of a fundamental statutory framework enacted for the very purpose of transferring immunity decisions from the Executive to the courts. But even if this Court were to conclude, against all textual and contextual evidence, that Congress so intended, the clause would be an unconstitutional delegation. For the clause, as so interpreted, would give the President unlimited discretion, for his own policy reasons, to strip the jurisdiction of Article III courts over long-standing claims against Iraq, or not, as he sees fit, absent any congressional direction to take the action, and not contingent on any future condition then unknown to the Congress. Petitioners' interpretation would also require that this Court accept, for the first time in its history, that Congress may turn over to the President its Article III responsibility for the statutory jurisdiction of the courts which textually refers not to a "power" of Congress as in Article I of the Constitution, but rather to specific action of "the Congress." As such, Petitioners' interpretation, if accepted, would violate Articles I and III of the Constitution.

3. Pursuant to the General Saving Statute, unless Congress *expressly* provides to the contrary, as it has not done in relation to section 1503, even the repeal of a statute does not "release or extinguish any . . . liability incurred under such statute . . . ." 1 U.S.C. § 109 (2006). This rule sets forth a general

purpose of Congress that can only be overcome by a subsequent expression of contrary purpose. The purported removal of any right to an FSIA action, without simultaneously offering another tribunal for resolving the rights of the parties, clearly sets aside mixed substantive and procedural rights of the parties under the FSIA and, as such, would be a violation of the General Saving Statute.

ARGUMENT

I. Congress Did Not Intend In Section 1503 Of EWSAA, Which Does Not Mention Courts, Jurisdiction, Or Immunity, To Delegate Authority To The President To Strip The Statutory Jurisdiction Of An Article III Court.[7]

Neither the text of section 1503, nor the broader text of EWSAA, nor the legislative history, supports Petitioners' assertion that Congress intended through this provision to delegate its Article III authority to the President to strip statutory jurisdiction from Article III courts with respect to long-standing cases against Iraq. The specific clause in question provides: "That the President may make inapplicable with respect to Iraq

[7] It is assumed that the issue being addressed by this Court is whether section 1503 stripped the jurisdiction of the courts with respect to Iraq and not with respect to the Iraqi Intelligence Service or any other entity of Iraq. As Judge Roberts concluded: "Neither the Act authorizing the Presidential Determination nor the Presidential Determination itself mentions Saddam Hussein or the Iraqi Intelligence Service either by name or by description." *See Acree v. Republic of Iraq*, 276 F. Supp. 2d 95, 101 (D.D.C. 2003), *rev'd*, 370 F.3d 41 (D.C. Cir. 2004).

section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." 117 Stat. at 579 (2003).

There are at least five textually preferable interpretations of this text than that asserted by Petitioners. First, in its primary meaning the word "or" is a disjunctive particle that marks a choice "either this or that but not both." Petitioners cannot benefit from this textually preferred meaning because the President sought to "make inapplicable" laws on both sides of the "or."

Second, in its principal secondary meaning the word "or" is used to link synonymous words or phrases introducing an alternative on an equal footing; that is "mathematics or the science of numbers." Under this principal secondary meaning textual interpretation of the phrase following the "or" takes its meaning from the phrase before the "or." In this case, as held by the Court of Appeals in *Acree*, the phrase "any other provision of law" takes its meaning from "*the Foreign Assistance Act of 1961*." That is, the phrase following the "or" refers to provisions of "the Foreign Assistance Act" of the phrase before the "or"; not to the Judiciary Code where FSIA is located. Petitioners and the United States seek to avoid these principal meanings of the word "or" in the clause by simply seeking to have this Court ignore everything before the "or," to omit the word "other," and to rewrite the "or" as an "and." This is the "textual limitation" being urged on this Court. Pet'rs' Br. at 11, United States *amicus* at 9.

A third textual interpretation relates to whether the scope of the laws in the dependent clause relate *only* to those which apply to terrorist states, or to those which apply *both* to terrorist and non-terrorist states. Sections 1605(a)(7) and 1610 of the FSIA, as purportedly "made inapplicable" to Iraq by the President, do apply *both* to terrorist and non-terrorist states. For under section 1605(a)(7) it is the designation "*at the time the act occurred*" which is the determinative date. That is, these provisions of the FSIA also apply to states which were once terrorist states but are no longer. Under this third textual interpretation, if the correct interpretation is that it applies to laws which apply *only* to terrorist states then section 1605(a)(7) of the FSIA is not included. And if it applies to laws which apply to both terrorist and non-terrorist states, as does the FSIA, it would permit the President to set aside for Iraq virtually the entire U.S. Code.

Fourth, the phrase "make inapplicable" could mean, as the tense most reasonably suggests, to take action as though Iraq *were no longer designated a terrorist state.* That would seem the most reasonable textual interpretation from both the tense used and the context of the President's need to transition Iraq from terrorist to non-terrorist status. But under that interpretation, section 1605(a)(7) of the FSIA still applies in full without removal of immunity because the determinative date is when the act occurred, regardless of whether the state is subsequently taken off the terror list. The alternate interpretation here, which logically must be that of Petitioners and which strains credulity, is that "make inapplicable" means to take action as though Iraq *never were a terrorist state.* That is, are we to believe that

during the ongoing war to oust Saddam Hussein, the Congress sought to state that Iraq had *never* been a terrorist state?

Finally, textually, since nothing in section 1503 refers to "courts," "jurisdiction," "immunity," or "FSIA," this absence of text makes it evident that section 1503 can have no clear or plain meaning stripping the courts of jurisdiction for long-standing cases pending against Iraq under FSIA—issues which the text fails to name.

Similarly, the text of EWSAA itself lends support to an interpretation that this clause must be interpreted in relation to economic assistance and appropriations. Thus, the clause appears in a Chapter titled: "BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT," and this Chapter appears in Title I of EWSAA entitled "WAR-RELATED APPROPRIATIONS." Further, the official title of EWSAA is "EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003." The clause does not appear in any act, title, chapter, or section that makes any reference in its full forty-four pages to the FSIA, immunity, jurisdiction, pending cases, or Iraq's responsibility to tortured American POWs and "human shield" victims.

When legislative history is examined, it is clear both from what the President told Congress the purpose of the language was that became section 1503 and from Committee and Conference Reports, that this section was intended simply to remove limitations on providing assistance to Iraq, as contained in the Foreign Assistance Act. Thus, the Executive told the Congress

in writing that this clause, which had been drafted by the Executive, would simply "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act."[8] Like constitutional convention and ratification debates combined, the "history" here is uniquely strong in that the Executive told the Congress in writing prior to the adoption and approval process the precise purpose of the clause in question which he had drafted and sent to the Congress.

The Senate Appropriations Committee Report said of this section: "The Committee provides the request for the repeal of the Iraqi Sanctions Act of 1990, *and other limitations on assistance for Iraq.*"[9] Further, both the House Appropriations Committee Report and the House/Senate Conference Report specify only identified provisions of law that contain limitations on assistance and that are identified as sections of the Foreign Assistance Act. That is, *all indications in the legislative record as to the purpose of this particular section refer either to removing limitations on assistance, or removing specifically identified provisions of the Foreign Assistance Act.*

This Court has never upheld stripping of statutory jurisdiction through legislation that neither clearly refers to nor mentions courts, jurisdiction or the judiciary. The *amicus* brief for the United States makes

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[8] Resp'ts' Opp'n Cert. at 22a ("GENERAL PROVISIONS" section).

[9] S. Rep. No. 108-33, at 21 (2003) (emphasis added).

much of the argument that the use by Congress of more cabined legislation enacted two months before EWSAA shows that "Congress knows how to use more limited language . . . when it wants to." United States *amicus* at 13. But even more clearly, the Congress certainly knows how to use language of "courts" or "jurisdiction" when engaging in jurisdiction stripping. For over and over again it has done so when that has been its purpose. *See, e.g.*, *Ex parte McCardle*, 74 U.S. 506, 508 (1869) ("jurisdiction," "'judgment of the Circuit Court to the Supreme Court.'") (citation omitted); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477 (1999) ("jurisdiction," "claims," "adjudicate cases," "'all past, pending, or future . . . proceedings'"); *INS v. St. Cyr*, 533 U.S. 289, 311 (2001) ("'no court shall have jurisdiction'," "'judicial review'"); *Calcano-Martinez v. INS*, 533 U.S. 348, 348 (2001) ("no court shall have jurisdiction" under 8 U.S.C. § 1252(c)); *Hamdan v. Rumsfeld*, 548 U.S. 557, 573 (2006) ("'no court, justice, or judge shall have jurisdiction'") (citation omitted); *Boumediene v. Bush*, 128 S. Ct. 2229, 2241 (2008) ("'no court, justice, or judge shall have jurisdiction'") (citation omitted).

Surely it is also relevant in seeking the intent of the Congress with respect to section 1503 that Congress subsequently enacted a provision, section 1083(c)(4) of the NDAA, which provides: "[n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 . . . has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code [the FSIA], or the removal of the jurisdiction of any court of the United States." 122 Stat. at 343. While that

provision may have been "waived" for Iraq, it has not been repealed.[10] Nor has a single member of Congress ever espoused Petitioners' interpretation.

To shoehorn their interpretation of section 1503, Petitioners and the United States urge that FSIA is a "sanction." But the core purpose of FSIA is not as a sanction, but rather as a provision permitting injured Americans to have their day in court. The 1996 Amendments to the FSIA were not added to a terrorism sanctions law; indeed specifically they were not part of the Iraq Sanctions Act. Rather, they were placed in the FSIA, in the Judiciary section of the U.S. Code intended to permit suit and recovery by American citizens in U.S. courts. That is, section 1605(a)(7) of the FSIA, the applicable immunity provision, was enacted as a part of the FSIA, itself intended as a congressional rejection of the old pre-FSIA practice urged by Petitioners to this Court.

Statutory interpretation occurs in context. The relationship between laws is an important part of that context. And since the FSIA is directly implicated here, a core purpose of the FSIA is also relevant. That core purpose was to remove determinations about immunity from the State Department to the courts. Thus, Congress provided in section 1602 of the FSIA: "Claims of foreign states to immunity should henceforth be decided by the courts of the United States . . . in

[10] Nor has it been waived for the United States. This provision, then, must be applicable in determining whether the president of the *United States* was given jurisdiction-stripping authority by the Congress.

conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (2006). The United States cites *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the pre-FSIA high water mark of deference to the State Department concerning immunity. United States *amicus* at 19. But even then the degree of deference was a matter for this Court. The Court was not, in *Republic of Mexico*, accepting that the President could repeal a congressional enactment which had established jurisdiction and transferred immunity decisions from the President to the Congress, as has the FSIA. Importantly also, given the statutory framework of the FSIA as the sole basis governing immunity issues today, there is no evidence that the Congress intended to set that framework, a part of the Judiciary Code, aside.

Further, the FSIA has a built-in mechanism for transition from terror state status to non-terror status. Very simply, acts occurring after the transition are no longer covered, while those before the transition remain covered. Therefore Congress would not believe change was needed in FSIA for the Iraq transition. Nothing in the text or legislative history of section 1503 suggests that the Congress had any intent to reverse either FSIA's transfer of immunity decisions from the Executive to the courts, or FSIA's terror state transition provision.

The meaning of section 1503 as confined to removing limitations on foreign assistance perfectly squares *both* its precise text and its legislative history. *No other interpretation of that proviso* can square the text and its history. Surely, if one interpretation squares both the text and its history, in a setting where the text certainly

offers no plain meaning supporting the counter interpretation, it should be preferred over an interpretation that rewrites the text itself to substitute "and" for "or," is inconsistent with the legislative history and broader textual context of the section, *including specifically what the Executive told Congress the clause meant*, and that is broadly inconsistent with the thrust of a long-standing congressional effort to remove immunity determinations from the Executive.[11]

II. Were Section 1503 Interpreted As Petitioners Urge, It Would Be An Unconstitutional Delegation In Violation Of Articles I And III.

This case is *not* a delegation case. Rather, it presents a plain vanilla issue of statutory interpretation as to whether Congress intended to include in any package of statutes which the President was authorized to "make inapplicable," provisions of the FSIA removing jurisdiction from pending cases in United States courts. As such, arguments of Petitioners and the United States concerning deference to the President's foreign affairs

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[11] Immunity is determined as of the filing of an action, not throughout trial. As the United States argued in the *Jiang Zemin* case "questions of immunity from jurisdiction are to be determined as of the date that . . . [a] lawsuit was filed . . . ." Reply in Support of Motion to Vacate October 21, 2002 Order, in *Plaintiffs A,B v. Jiang Zemin & Falun Gong Control Office*, Civil Action No. 02 C 7530, at 1 n1 & 22 (N.D. Ill. 2003). *See also Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); Fed. R. Civ. P. Rule 12(b). The original *Acree* action was filed on April 4, 2002. That action and any other action filed before the Presidential "Message" of May 22, 2003, thus could not be affected even by a removal of immunity.

power are misplaced. No deference should be accorded the President on the issue of whether Congress intended to authorize him to repeal a particular statute. Where, as here, the issue of statutory interpretation is whether Congress delegated authority at all to effectively repeal a statute there is, of course, no deference, for the issue is simply that of statutory interpretation, not presidential implementation of the statute[12] or exercise of the President's foreign affairs power. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

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[12] There are, however, serious failures in presidential implementation of the statute. Thus, it was the President's "Message" of May 22nd, which as an afterthought first extended his "Determination" of May 7th to the FSIA. While the May 7th Determination was published in the *Federal Register*, the crucial "Message" of May 22nd (J.A. at AI) was itself apparently never published in the *Federal Register* despite its nature as a "substantive rule of general applicability" under section 522(a) of the Administrative Procedure Act. Further, the Executive has provided no evidence to any court that the four named committees of Congress, as required by the proviso to section 1503, were provided five days notice prior to either the President's "Determination" of May 7th, or his "Message" of May 22nd, that the President would assert authority under section 1503 to strip jurisdiction or affect "courts," "jurisdiction," "immunity," or "the FSIA". This was an important mechanism of congressional control built into EWSAA and failure to so notify the named committees of Congress should alone make any asserted jurisdiction stripping inapplicable. The specific prior notification requirement as a condition for exercise of 1503 authority provides: "That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to . . . [two committees specified in each House of the Congress.]." EWSAA § 1503, 117 Stat. at 579.

But were Petitioners' interpretation accepted, it would be an unconstitutional delegation. For the clause, as so interpreted, would give the President unlimited discretion, for his own policy reasons, effectively to repeal an indeterminate array of ill-defined statutes, or not–not contingent on any condition at the time the delegation was enacted, not mandating any duty of presidential action or inaction, and even permitting presidential removal, or not, of the statutory jurisdiction of an Article III court. As such, Petitioners' interpretation would violate Articles I and III of the Constitution and the important principle of separation of powers so central to our constitutional democracy. Moreover, a core purpose of nondelegation doctrine is presented here—that is to protect the constitutional lawmaking authority of the Congress. This purpose is singularly relevant for a clause drafted by the Executive, presented to Congress in writing for one purpose, and then asserted, after congressional enactment and during ongoing litigation, as providing authority to remove the statutory jurisdiction of an Article III court, an entirely different purpose.

As the Court stated in *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), quoting its earlier decision in *INS v. Chadha*, 462 U.S. 919, 951 (1983), "power to enact statutes may only be 'exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" *Id.* And again quoting *Chadha*: "'[R]epeal of statutes, no less than enactment, must conform with Art. I.'" 524 U.S. at 438 (citation omitted). And "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* Or, as the Court stated in *Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579, 587 (1952), "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.*

This Court in *Clinton*, drawing heavily on its earlier decision in *Field v. Clark*, 143 U.S. 649 (1892), a foreign affairs case concerning the President's authority to suspend exemptions under the Tariff Act of 1890 on occurrence of certain conditions, set out a three-part test for determining a constitutional delegation to the President that will not violate Article I of the Constitution. *First*, the presidential exercise must be contingent upon a condition that did not exist at the time the purported delegation was enacted; *second*, the President must have a duty to act when the condition occurs; and *third*, when the President acts he must be "executing the policy that Congress had embodied in the statute." 524 U.S. at 444. The Court clearly rejected any "[a]ct [that] gives the President the unilateral power to change the text of duly enacted statutes." *Id.* at 447. In basing its analysis on the *Field* case, the Court developed its three-part test despite *Field*, as a tariff matter, being a case impacting the foreign affairs arena. *Id.* at 444-45. In discussing *Field*, while the Court recognized a greater degree of discretion for the President in foreign affairs, the Court pointedly noted: "*More important*, when enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President." *Id.* at 445. And in an opinion authored by Justice Scalia, in which

Justices O'Connor and Breyer joined, the Justices "acknowledge[d] that the limits . . . [on reduction or repeal of statutes] may be much more severe [than on augmentation of statutes through substantive rulemaking]." *Id.* at 465 (Scalia, J., dissenting, *and* O'Connor, J. *and* Breyer, J. joins as to Part III, concurring in part and dissenting in part).

Section 1503 of EWSAA, if interpreted as Petitioners assert, would be a paradigmatic violation of Article I and the principle of separation of powers embodied in the nondelegation doctrine. The purported power to repeal portions of a duly enacted statute—indeed to repeal portions of an unidentified number of unidentified statutes—*fails all three of the Clinton requirements* for a constitutional delegation.

First, the purported authority is not contingent upon an identified condition that did not exist when EWSAA was passed. Indeed, the authority is contingent upon no condition at all. Further, EWSAA was passed during the Iraq War, and Petitioners have suggested nothing not known to the Congress or the President at the time of its passage which subsequently became known only three weeks later at the time of the Presidential Determination. In fact, the President told the Congress the purpose of the clause *before* it was passed, without identifying any condition to be ascertained then or later as a condition of exercise. That is, there is no reason the Congress itself could not have specified the laws to be "made inapplicable" at the time EWSAA was passed, rather than delegating authority to the President, acting only three weeks later.

Second, the authority purportedly delegated to the President under Petitioners' interpretation embodies no duty on the President to act or not act if the identified condition occurs. Rather, the President is free, for his own policy reasons, to make inapplicable *or not*, as he sees fit, an unidentified number of unidentified statutes. The language of the clause is "may make inapplicable." Certainly there is no duty on the President to be exercised pursuant to an identified contingent event.

Third, given the complete absence of any congressionally identified contingent event, and the complete absence of any identified duty on the President with respect to such contingent event, the President would not be "executing the policy that Congress had embodied in the statute," but rather relying on his own policy judgment. *See Clinton*, 524 U.S. at 444. Indeed, when President Bush did belatedly seek to repeal provisions of the FSIA, he was not carrying out any policy that the Congress had embodied in EWSAA. To the contrary, he sought to take advantage of the perceived opportunity to gain victory in a long-running battle between the Congress and the State Department about civil actions against terror states.

In short, the purported delegation is not cabined by any policy guidance to control the potentially vast discretion to repeal an unidentified universe of laws. The clause fits perfectly the Court's description of an unconstitutional act as one that "gives the President the unilateral power to change the text of duly enacted statutes." *Id.* at 447. Further, the delegation is a setting of repeal or reduction of a fundamental statutory

framework rather than one of augmentation or rulemaking, and thus would receive higher scrutiny. *See id.* at 464-65.

The purported delegation would even fail the constitutional test for congressional delegation to agencies, as set out by this Court in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). In *Whitman*, the Court said: "we repeatedly have said that when Congress confers decision making authority upon agencies *Congress* must 'lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is *directed* to conform.'" *Id.* at 472 (emphasis added) (alteration in original) (citation omitted). Here, section 1503 neither lays down an *intelligible principle* nor is there any *direction* to the President to conform, but instead only an open-ended invitation to pursue presidential policy as though mandated by Congress.

Further, this case unmistakably presents nondelegation concerns rather than *Chevron* special deference. For here the Executive seeks to set aside a statutory framework enacted by Congress; that statutory framework was for the very purpose of transferring authority from the Executive to the courts and ending a much criticized Executive practice; the action sought is repeal rather than augmentation of law; it is not pursuant to any rulemaking authority; it would set aside a self-executing treaty obligation of the United States in the Third Geneva Convention; there is no evidence of any deliberative process in extension to the FSIA in the "Message" of May 22nd; there is apparent non-compliance with congressionally established

reporting and publication mandates; it presents issues of potential abuse in that it was drafted by the Executive, was interpreted in a litigating posture to support the Executive's view in a struggle it had lost with the Congress, and was aimed at on-going litigation in which the Executive had an interest; it presents a vital issue for rule of law of retroactive removal of jurisdiction over pending cases; and it raises serious constitutional and structural problems concerning the role of Congress and the independence of the judiciary.[13]

Nor does this case present expertise uniquely in the province of the President. The purpose identified by the President as the reason for the clause merely identified the need to remove restrictions on foreign assistance to Iraq. As an appropriations matter, this is hardly within the core of the Executive's foreign affairs power. And as this clause is sought to be exercised against American POWs and "human shield" victims, it is specifically a case concerning FSIA and the jurisdiction of courts in Washington D.C., not combat operations in Iraq or even implementation of a claims settlement agreement.

Further, this asserted delegation of jurisdiction-stripping power violates the authority of the Congress

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[13] *See* W. N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1092 (2008); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 Yale L.J. 1230 (2007) ("law-interpreting authority at some point effectively constitutes law-breaking authority.") (abstract).

under Article III of the Constitution. It is established law that Congress may set the jurisdiction of certain Article III courts. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). But it is equally clear that any removal of jurisdiction is subject to the limitations of the Constitution, including separation of powers. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

Congress has given the Executive neither a letter of text nor a word of history purporting to delegate authority to remove the jurisdiction of an Article III court. But even if Congress had clearly sought to delegate this authority, Congress' authority to remove the statutory jurisdiction of an Article III court, as set out in Article III, Sections 1 and 2, may not be delegated. The language of Article III, Sections 1 and 2, of the Constitution is clear; it is "*Congress may from time to time ordain and establish*" inferior Article III Courts (Section 1), and it is "Exceptions" and "Regulations" "*as the Congress shall make*" with respect to the jurisdiction of the Supreme Court (Section 2). This language is in contrast to the use of the phrase "Congress shall have power" in dealing with the usual legislative ager da of Congress as this language appears repeatedly in Article I, Section 8, and Amendments XIII, XIV, XV, XVI, XIX, XXIII, XXIV, and XXVI of the Constitution, and even Article III, Section 3, in declaring "Punishment of Treason."

The usual congressional delegation risks blending legislative and executive powers. But delegation to the Executive to strip jurisdiction of an Article III court risks blending legislative, executive, and judicial powers. Congressional delegation to the Executive is itself under close scrutiny, as the *Clinton* decision shows, but routine

rulemaking delegations involving filling in the interstices of the law, while running the risk of blending legislative and executive functions, are far less intrusive of separation of powers than a delegation of authority to the President to remove jurisdiction from an Article III court in a pending case. Moreover, a particularly dangerous feature of the *McCardle* doctrine is that the Congress may have power to shut down a pending case before the courts by interfering with its continuing jurisdiction when the Congress does not like the way a case is going. Delegating this power to the President would substantially enhance this risk, particularly as we see here after the President waits fifteen months to see the outcome in *Acree*. Surely *McCardle* should not be extended to an uncabined delegation to the President, as Petitioners seek.

It is relevant in this connection to note the recent analysis by Justice Breyer, joined by Justices O'Connor and Scalia, in dissenting in *Clinton v. City of New York*, 524 U.S. 417, 469, 480 (1998), in which the Justices note:

> There are three relevant separation-of-powers questions here: (1) Has Congress given the President the wrong kind of power, *i.e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?"

Id. at 480 (Breyer, J., dissenting, *with* O'Connor, J. *and* Scalia, J., join as to Part III, dissenting). While the last

of these questions is engaged in the merits of a *Clinton* delegation analysis, the second of these is precisely the point here: Congress has the sole power to remove jurisdiction of Article III Courts. As the Court said in *Cary v. Curtis*, 44 U.S. (3 How.) 236, 244-45 (1845), it is the Congress "who possess the sole power" over jurisdiction in inferior tribunals.

In addition to encroaching on congressional prerogative, the Executive action, delaying fifteen months to ascertain the outcome of the *Acree* case before first asserting its jurisdiction-stripping argument, also encroaches on judicial prerogative. In *Klein*, the Supreme Court struck down a law of the reconstruction Congress which sought to offset the effect of Executive pardons by purportedly terminating jurisdiction of the courts. The Court held in part that the effort unconstitutionally encroached on the President's pardon power, but the Court also noted: "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end." 80 U.S. (13 Wall.) at 145. And, again, the Court noted: "What is this but to prescribe a rule for the decision of a cause in a particular way?" *Id.* at 146.

III. The General Saving Statute Prohibits The Removal of Jurisdiction In These Circumstances Absent An Express Provision To Extinguish Liability.

Pursuant to the General Saving Statute, 1 U.S.C. § 109 (2006), unless Congress *expressly* provides to the contrary, as it has not remotely done in relation to FSIA here, even the repeal of a statute does not "release or

extinguish any . . . liability incurred under such statute . . . ." *Id.* This long-standing congressional policy embodies a principle of fair dealing and protection of stability of expectations concerning operation of the judicial system. By this provision Congress itself has adopted the rule that unless a statute *expressly* provides to the contrary, the repeal of a statute does not release any liability incurred under the repealed statute, or affect enforcement of such liability with respect to an action pending at the time of the repeal. The General Saving Statute provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall *so expressly provide*, and *such statute shall be treated as still remaining in force for the purpose of sustaining any proper action* . . . for the enforcement of such . . . liability.

Id. (emphasis added). This rule sets forth a general purpose of Congress that can only be overcome by a subsequent expression of contrary purpose.

When in 1947 Congress passed a Resolution repealing in general terms a large body of war powers and the Executive contended that it removed jurisdiction of the District Court over a pending case with regard to liability of the United States under the War Risk Insurance Act, this Court held that the General Saving Statute embodied a principle of fair dealing that not only saved from extinction a liability incurred but also saved the statute itself for purposes of enforcement

of the liability. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389 (1953). Mr. Justice Frankfurter, writing for the Court, applied the General Saving Statute to a pending case that had not yet even gone to trial at the time of the repeal. The Court said in language (and context) closely paralleling the present case that "[i]n repealing the War Risk Insurance Act among numerous other statutes, Congress was concerned not with jurisdiction . . . . [i]t was concerned with terminating war powers after the 'shooting war' had terminated." *Id.* at 391. Mr. Justice Frankfurter also noted that the Saving Statute embodies a principle of fair dealing and the "'statute shall be treated as still remaining in force. . . .'" *Id.* at 389 (citation omitted). And, in an apt description of the modern 1996 anti-terror amendments to the FSIA as embodied in Sections 1605(a)(7) and 1610, he spoke of statutes which embody "fused components of the expression of a policy." 344 U.S. at 390.

Five years after the decision in *De La Rama Steamship*, this Court again was faced with a repeal of jurisdiction case in *Bruner v. United States*, 343 U.S. 112 (1952). This was a case in which Congress had clearly withdrawn jurisdiction (a preexisting statutory provision denying jurisdiction was broadened by changing officers to officers or employees) and the Court determined that in the case of a clear withdrawal of jurisdiction, the withdrawal would apply to pending cases. Importantly, however, the Court also considered the General Saving Statute but concluded that the jurisdictional change had "not altered the nature or validity of petitioner's rights or the Government's liability but . . . simply reduced the number of tribunals authorized to hear and determine such rights and

liabilities." *Id.* at 117. The clear implication is that had the repeal involved a setting of mixed substantive and procedural rights, as in *De La Rama Steamship* and as under the FSIA, or had the repeal removed all tribunals for determining the liabilities, as is also true here where the FSIA provides the sole tribunal available to the parties, that the Court would have applied the General Saving Statute to prevent that result.

Clearly, Iraq has a statutory "liability" under section 1605(a)(7) of the FSIA which may not be waived absent an "express" statutory provision to that effect from the Congress, and thus, under the General Saving Statute, the FSIA remains in force whatever the interpretation of section 1605.

More recently, the General Saving Statute was applied by the Court of Appeals in the District of Columbia Circuit to the issue of governmental immunity from tort liability in *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986). In *Keener*, the Court of Appeals said "the repeal of the 1928 Act did not result in a forfeiture of the remedies available at the time of repeal for injuries incurred prior to repeal . . . ." *Id.* at 1179.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN NORTON MOORE
Counsel for Amici Curiae
824 Flordon Drive
Charlottesville, Virginia 22901
(703) 216-3387 (T)
(434) 977-2749 (F)